No. 95-1118

In The
Supreme Court of the United States
October Term, 1995

BLUE CROSS & BLUE SHIELD
UNITED OF WISCONSIN and COMPCARE
HEALTH SERVICES INSURANCE CORPORATION,
Petitioners,

v.

THE MARSHFIELD CLINIC and SECURITY
HEALTH PLAN OF WISCONSIN, INC.,
Respondents.

BRIEF OF AMICUS CURIAE STATES OF WISCONSIN, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, TEXAS, WASHINGTON AND WEST VIRGINIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The States of Wisconsin, Arizona, Arkansas, Delaware, Florida, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia (hereinafter "Amici States") submit this brief in support of the plaintiff's petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Blue Cross & Blue Shield United of Wisconsin and Compcare Health*

Services Insurance Corp. v. Marshfield Clinic and Security Health Plan of Wisconsin, Inc. (hereinafter *Blue Cross*), 65 F.3d 1406 (7th Cir. 1995), *rev'g*, 883 F. Supp. 1247 (W.D. Wis. 1995).[1] Review is warranted because the decision of the Seventh Circuit panel defines health care markets and applies the rule of reason in a manner which "conflicts with applicable decisions of this Court," Sup. Ct. R. 10(c), and which will undermine state antitrust enforcement in health care markets.

INTEREST OF THE AMICI STATES

As the chief law officers of their states, attorneys general are the primary public enforcers of the state antitrust laws, which are often required to be interpreted in conformity with federal law.[2] Both because these markets are generally

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[1] Citations to these decisions herein will refer to copies of the decisions contained in Appendix A attached to the Petition for Writ of Certiorari ("Pet. App.") submitted by petitioner. Consistent with Sup. Ct. R. 37.1, the Amici States subscribe to the arguments presented in the Petition and will not repeat those arguments herein.

[2] *E.g.*, *Carl N. Swenson Co., Inc. v. E.C. Braun Co.*, 272 Cal. App.2d 366, 77 Cal. Rep. 378, 379-80 (1969); *Grillo v. Board of Realtors*, 91 N.J. Super. 202, 219 A.2d 635 (1966); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966). *See also* Mont. Code Ann. § 30-14-104 (1989); Utah Code Ann. § 76-10-926 (1991); Wash. Rev. Code 19.86.920. The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states. 15 U.S.C. § 15(c) (1989); *State of Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (common law *parens patriae*); *Hawaii v. Standard Oil Company of California*, 405 U.S. 251 (1972).

local, and because HMOs and other types of health care arrangements are growing rapidly, the Amici States have a vital interest in preventing the evisceration of the antitrust laws as applied to health care markets. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982). Indeed, HMOs have grown extremely rapidly to where HMO enrollment is projected to near 65 million Americans in 1996, up more than twenty-five percent since January, 1995.[3] Moreover, this membership surge, according to the newsletter of the American Medical Association, "will intensify price competition among HMOs, which are now more likely to battle each other--not higher-priced indemnity plans--for enrollees."[4]

The facts found by the jury, and concurred in by the trial judge, include a wide variety of monopolistic and conspiratorial acts that accomplished respondent Marshfield's goal of squelching HMO competition in north central Wisconsin (Pet. App. 32a-37a). Unless such conduct is carefully analyzed in the context of real product markets and then distinguished from aggressive, but legitimate, competition, the states will encounter great difficulty in maintaining competitive health care markets.

The Amici States are keenly disappointed that the court of appeals did not analyze the evidence in this case in a manner consistent with this Court's antitrust decisional law. If left standing, the decision will likely constitute a significant barrier to effective state antitrust enforcement in health care

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[3] Julie Johnsson, "HMOs Dominate, Shape the Market," Am. Med. News, January 22/29, 1996, at 1.

[4] *Id.*

markets. The decision will certainly encourage the rapid consolidation of HMOs, which state antitrust enforcers will be largely powerless to stop. Also, the approval by the court of appeals of a host of anticompetitive acts and agreements between Marshfield and independent doctors will undercut recent state and federal enforcement efforts.[5]

In addition, the Amici States have an even more particularized interest in the effective implementation of state policies designed to encourage the growth of HMO insurance products in competitive markets. For example, in the early 1980's, Wisconsin, like many other states, attempted to create a legal and economic environment that would encourage the growth of HMOs and would encourage competition among those HMOs.[6] Unfortunately, the benefits of these changes

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[5] *See, e.g., United States and State of Arizona v. Delta Dental Plan of Arizona, Inc.* 1995-1 Trade Cas. (CCH) ¶ 71,048 (D. Ariz. 1995). The gravamen of the complaints was that Delta Dental engaged in price-fixing through the mechanism of most favored nation provisions in its contracts with plan dentists. The *Delta* case identified significant consumer demand for a discounted dental plan product wholly separate from existing insurance products. The settlement prohibits use of MFNs and discrimination against any dentist who offers discounted services.

[6] As discussed in Section I(B), below, the states have created distinct regulatory requirements for HMOs. *See* Jon B. Christianson, et al., *The HMO Industry: Evolution in Population Demographics and Market Structures*, 48 Med. Care Rev. 3, 29 (1991) (forty-six states have explicit HMO legislation). Moreover, states such as Arizona have operated their indigent health care systems through contracts with HMOs which are required to bid competitively. For states such as Arizona, HMOs and fee-for-service delivery systems are clearly separate products. Moreover, Congress has encouraged the use of managed care programs in the Medicare and Medicaid program in conjunction with the states' efforts (Pet. App. 23a).

in state policy have not been realized in north-central Wisconsin. As found by the jury, Marshfield's actions extinguishing provider competition and competition in HMO insurance products not only strike at the heart of state antitrust enforcement in local markets, they undermine Wisconsin's fifteen-year and other states considerable efforts to create a workably competitive environment for unique HMO insurance products.

If the evidence of collusive anticompetitive acts and control over insurer choice and price admitted at trial is insufficient to support the jury's decision, as the court of appeals held, it will be extremely difficult for state and federal antitrust enforcers to maintain competition in health care markets. In fact, if juries are not allowed to decide health care antitrust cases on the facts, it could be argued that other industries are subject to this same vulnerability. If an HMO cannot, on any set of facts, be a separate product market, then protecting competition between HMOs may become virtually impossible. The court of appeals' action could have dangerous consequences for antitrust enforcement in general. For these reasons, the Amici States support the petitioners' contention that the decision of the court of appeals should be reviewed.

SUMMARY OF REASONS CERTIORARI SHOULD BE GRANTED

The attorneys general ask the Court to grant the petition for certiorari for the following reasons:

1. This Court has repeatedly held that the definition of markets in antitrust cases should be based on

facts. *E.g.*, *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992), *citing*, *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) (factual inquiry into "commercial realities" faced by consumers required for proper market definition). *See also Brown Shoe v. United States*, 370 U.S. 294 (1962) ("practical indicia" standard adopted). The court of appeals not only departed from that standard, it did so in an astonishingly cavalier manner. The court of appeals substituted rigid economic theories for the conclusions of the finder of fact with but a casual reference to "contemporary principles" of antitrust analysis (Pet. App. at 3a) and without any citation to this Court's precedents.

The trial court refused to second-guess the jury's findings when it concluded that "[f]rom all of this [evidence] the jury could have reasonably determined that an HMO is a distinct and unique form of health care financing for which a relevant product market exists" (Pet. App. at 24a). In short, the court of appeals violated this Court's established standards by taking the issue of product market definition from the jury and substituting its economic predilections for the facts. *See, e.g.*, *Kodak*, 504 U.S. at 454-55, 466-68.

2. The court of appeals' decision is also erroneous because it ignores the effect of federal and state law and policy on market definition. Petitioners presented significant evidence relevant to market definition including, especially, Wisconsin and federal statutes and policies designed to create a competitive environment conducive to the creation of HMO insurance products. In effect, these state regulations differentiate the underlying cost structure of HMOs from other health insurance products. The jury and trial judge recognized that this evidence was important (Pet. App. at 23a). The court of appeals' studied avoidance of this

evidence is inconsistent with this Court's view that the regulatory environment of markets is relevant to market definition. *E.g.*, *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974).

3. The court of appeals decided, as a matter of law, that a plethora of anti-competitive conduct by the defendants, taken singly or together, was not sufficient to allow a jury to consider either Section 1 or Section 2 Sherman Act claims. Although ignoring much of the evidence supporting the jury findings of conspiracy and anticompetitive effect, the court of appeals conceded evidence in the record:

> --that respondent Marshfield Clinic had entered into *per se* illegal market allocation agreements with other physician groups in north central Wisconsin:
>
> --that Marshfield physicians prevented competing physicians from obtaining privileges at the key hospital in the area and that Marshfield physicians wilfully refused to provide cross-coverage for physicians unwilling to adhere to Marshfield's HMO scheme;
>
> --that there was substantial evidence of price-fixing allowing Marshfield to achieve "most favored nation" status vis-a-vis hundreds of otherwise independent physicians; and
>
> --that Marshfield physicians acted in concert with other physicians and hospitals with the express purpose of foreclosing entry by competing HMO insurers.

Clearly, the evidence in the record was sufficient to allow the jurors to find antitrust violations, and they in fact did so. The court of appeals' rejection of the jury's findings is inconsistent with this Court's precedents. *See, e.g., Kodak*, 504 U.S. at 454-55, 466-68 (1991); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (agreement by dentists to withhold x-rays could constitute Section 1 violation).

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT BY SUPPLANTING THE FACTUAL BASIS FOR MARKET DEFINITION.

Fourteen years ago, this Court determined that the health care industry would not be afforded any special exemptions or immunities from the national policy favoring competition embodied in the Sherman Act. *See Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982). Subsequent decisions of this Court have underscored the applicability of federal antitrust laws to a variety of conduct tending to subvert competitive health care markets. *E.g., F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). Rather than apply these precedents to the facts of this case, the court of appeals made sweeping generalizations about health insurance markets and about anticompetitive practices by dominant health care providers. As a result, the far-

reaching rhetoric of the court of appeals decision will prevent lower courts from correctly applying Supreme Court precedent in a wide variety of new cases.

Subsumed in the substantive issues presented for review is, perhaps, the more fundamental question of the proper role of the trier of fact in resolving basic factual issues. The court of appeals, unlike the trial court, did not leave the credibility of witnesses or the weight of the evidence for the jury.[7] Nor did the court of appeals accept that the evidence presented created at least a question of fact on product market definition. Instead, the court of appeals substituted its judgment for that of the jury on this key issue notwithstanding this Court's precedents. *Kodak* instructed that where doubt is present regarding a product market definition issue, the issue "should be resolved by the trier of fact." 504 U.S. at 463.[8] Further, the approach of the court of appeals in rejecting *all* of the evidence suggesting a separate HMO product market (Pet. App. at 7a) directly contradicts the approach of other courts of appeal which have held that relevant market definition is a finding of fact subject to the "clearly erroneous" standard. *E.g.*, *United States v. Central State Bank*, 817 F.2d 22, 24 (6th Cir. 1987); *Westman Comm'n Co. v. Hobart Int'l Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988);

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[7] The author of the court of appeals' decision is on record as questioning the ability of juries to decide antitrust cases. R. Posner, *Antitrust Law, An Economic Perspective* 235 (1976).

[8] This Court also stated in *Kodak* that on a motion for summary judgment the nonmoving party's inferences need only be "reasonable" in order to reach a jury. 504 U.S. at 468-69, distinguishing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986).

A. Even considering only those facts that the court of appeals conceded were supported in the record, the jury should have been permitted to find an HMO market as it, in fact, did.

Product market definition is not an exact science. In determining which products compete with each other, economists traditionally assess the degree to which products are interchangeable in use and the degree to which consumers are willing to substitute one product for another. Because these issues are intensely fact-bound, this Court has traditionally looked to "practical indicia" of competing products when defining markets for antitrust cases. *E.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

More recently, this Court declared that "proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Kodak*, 504 U.S. at 482. *See also United States v. E. I. DuPont deNemours & Co.*, 351 U.S. 377 (1956) (Section 2 monopolization case). The "Supreme court has wisely recognized there is 'some artificiality' in any boundary but that 'such fuzziness' is inherent in bounding any market." Areeda, Hovenkamp & Solow, Antitrust Law, volume IIA, ¶ 530D at 154 (1995).

Devoid of citation to any of this Court's authority on product market definition, the court of appeals' decision overturned a jury finding which the trial judge had found to be supported, amply, by numerous facts admitted into evidence. *Blue Cross* (Pet. App. at 7a), *rev'g* (*id.* at 24a). In so doing, the court of appeals has created a precedent that will make it extremely difficult for plaintiffs to define viable product markets.

The Court should grant the petition for *certiorari* to ensure that the courts apply the correct standard for product market definition. In this case, facts conceded by the court of appeals should have been sufficient to permit a jury to find a product market where:

> --buyers perceive HMOs as a distinct health insurance product;
>
> --sellers recognize HMO products as distinct from other health insurance products;
>
> --high prices and profit margins have persisted over time with respect to HMO insurance products; and
>
> --exclusionary conduct has been directed at potentially competing HMOs, but not at other types of health insurance products.

"From all of this the jury could have reasonably determined that an HMO is a distinct and unique form of health care financing for which a relevant product market exists." *Blue Cross* (Pet. App. at 24a).

In effect, the court of appeals categorically concluded that "practical indicia" could never support a separate product market for HMOs. *Blue Cross* (Pet. App. at 7a). Not only did the court of appeals ignore key facts relating to product market definition,[9] but, even more troubling, the court of appeals recited and then disregarded a litany of facts which would clearly have met this Court's standard of "practical indicia" of a separate product market for HMOs. At a minimum, the market definition issue was appropriately one for the jury.

Instead, the court of appeals consistently interprets facts -- such as buyer perceptions that HMOs are fundamentally different than other health insurance products -- to fit its ultimate conclusion.[10] Moreover, the court of appeals makes no attempt to place any of the facts in the record, such as buyer perceptions, in the context of this Court's decisional law. For example, supermarket grocery stores with virtually unlimited choices (analogous to traditional fee-for-service health insurance) were found to be not effectively constrained in price by "mom and pop" grocery stores that offered a more limited choice of the same goods and services. *California ex rel. Van de Kamp v. American Stores*, 697 F. Supp. 1125y, 1129 (C.D. Cal. 1988),

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[9] For example, see discussion in Section I(B), below.

[10] To give but one example, the court of appeals *ad hoc* assertion that HMOs are not a separate product but just "a method of pricing medical services," *Blue Cross* (Pet. App. at 3a) is inconsistent with the court of appeals' own observation that "many people don't like them [HMOs] because of the restriction on the patient's choice of doctors or because they fear that HMOs skimp on service since, as we said, the marginal revenue of a medical procedure to an HMO is zero." *Id.* at 5a.

aff'd in part, rev'd in part, 872 F.2d 837 (9th Cir. 1989), *rev'd for failure to order divestiture*, 495 U.S. 271 (1990).[11]

One may debate whether the "practical indicia" support the conclusion that supermarkets and "mom and pop" stores are or are not in the same product market. However, under this Court's precedents, one cannot conclude as a matter of law that they are in the same product market and disregard all competing evidence and inferences suggesting otherwise. Yet, that is exactly what the court of appeals has done with respect to HMO and non-HMO insurance products.

Not only do buyers perceive HMOs as distinct products, sellers also recognize HMO products as distinct from other health insurance products. The court of appeals acknowledged the evidence of exclusionary conduct that had the purpose and effect of preventing Marshfield Clinic physicians from dealing with competing HMOs, although not other health insurance products. This Court has held that exclusionary conduct designed to prevent competition in a particular market is evidence of a separate market; such

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[11] In discussing the *American Stores* decision, Areeda, Hovenkamp and Solow observed that:

> Neither the court nor the defendant's documents saw close competition for supermarkets from "mom and pop" stores, convenience stores, gasoline stations, and other retailers who commonly sold a limited number of grocery items even though such stores (a) often matched supermarket prices on certain items and (b) might constrain very large price increases by supermarkets.

Areeda, Hovenkamp & Solow, Antitrust Law, volume IIA, ¶ 565 at 276 n.5 (citing *American Stores*).

practices would not be needed if competitive products could be created without such exclusionary conduct. *See Kodak*, 504 U.S. 479-81.

The court of appeals also did not dispute evidence that the respondent clinic refused to allow its physicians to "cross-cover" with independent physicians; discouraged hospitals that it controlled from joining competing HMOs; and restricted staff privileges of independent physicians at hospitals it controlled (Pet. App. at 12a-13a). In short, this exclusionary conduct supplemented the other evidence demonstrating that sellers in this market perceived HMOs as a fundamentally different product. *See generally* Areeda, Hovenkamp & Solow, Antitrust Law, volume IIA, ¶ 524a at 133 (1995).[12]

This Court should grant the petition for *certiorari* to clarify the correct standard for product market definition in general and as applied in this case on facts.

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[12] The court of appeals also acknowledged, then ignored, other evidence relevant to market definition. For example, it was undisputed that respondent HMO charged prices (and realized profits) far in excess of other Wisconsin HMOs because it faced no competition from competing HMOs. *Blue Cross* (Pet. App. at 9a; Tr. 1119-22). While not conclusive, this fact is one of the indicia that can support, along with the other facts, an appropriate market definition and the existence of market power. *See generally United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2nd Cir. 1945). *See also* Areeda, Hovenkamp & Solow, Antitrust Law, volume IIA, ¶ 515 (1995).

B. Wisconsin statutes and policies singling out HMOs should be considered when defining health care product markets.

This Court has long analyzed state and federal regulatory frameworks when defining a product market because such frameworks often circumscribe the choices consumers can make and the terms of competition and costs facing sellers. *E.g.*, *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 665 (1974). *See also United States v. Household Fin. Corp.*, 602 F.2d 1255, 1258-9 (7th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980). Consistent with these precedents, the district court and jury examined the state and federal regulatory framework when addressing product market definition. *Blue Cross* (Pet. App. 23a-26a). The petitioners' expert witnesses cited federal and state laws that distinguish HMOs from standard health care insurance on both the buyer and seller side of the market. The district court and jury weighed this evidence with the other practical indicia to determine that a relevant product market existed. (*Id.* at 23a.) In direct contrast, one looks in vain for any discussion of these facts in the court of appeals decision.

Where anticompetitive conduct targets HMO growth, the relevance of policies designed to encourage the growth of HMOs is heightened. The conduct at issue here is the latest example of the ability of health care providers to thwart the emergence of unique health care products. Because HMOs are fundamentally different from traditional health insurance plans, physicians have historically rejected the control over physician practice represented by HMOs. *See generally F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986);

Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). In part to overcome this resistance, the federal and state legislatures have attempted to alter the economics of health care markets. For example, Congress' requirement that employers with more than 25 employees offer a qualified HMO plan directly increases demand for HMOs and decreases the substitutability of other health insurance plans for HMOs.[13]

Similarly, regulation has changed the underlying economics of HMOs from the perspective of health care insurance sellers. For example, as articulated by the trial court, Pet. App. 24a, Wisconsin has adopted statutes regarding HMOs that create a unique economic environment or cost structure for HMOs. For example, Wisconsin statutes set out unique capital requirements, Wis. Stats. §§ 609.96, 613.19 (1993-94), and unique treatment under Wisconsin's guaranty fund. Wis. Stat. § 646.11(2) (1993-94). In addition, Wisconsin has adopted programs which either by choice or mandate will place an increasing percentage of the Medicare and Medicaid population into HMOs. *See generally* Wis. Stats. § 49.45 (1993-94).

The court of appeals' treatment of the product market issue undermines the efforts of Congress, Wisconsin and other states[14] to support and promote HMO insurance products.

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[13] Wisconsin has also attempted to promote HMOs by requiring that state employees be offered HMO and non-HMO alternatives. Wis. Stat. § 40.51(6) (1993-94).

[14] *E.g.*, Fla. Stat. Ann., §§ 641.17 *et seq.* (West 1984; Supp. 1995); Ill. Ann. Stat., *ch.* 215, ¶ 125 (Smith-Hurd 1993); Md. Health-Gen. Code

(continued...)

Indeed, with its product market decision, the court of appeals has opened the way for a series of consolidations that could significantly eliminate competition among HMOs and between HMOs and traditional health insurance plans.

This Court should grant the petition for *certiorari* to establish the appropriate weight state and federal law and policy should be given in determining market definition and market power.

II. THE COURT OF APPEALS' REJECTION OF ANY CAUSE OF ACTION UNDER THE SHERMAN ACT CONFLICTS WITH THE DECISIONS OF THIS COURT.

The court of appeals decided, as a matter of law, that a plethora of anticompetitive conduct by the defendants, taken singly or together, was not sufficient to allow a jury to consider either Section 1 or Section 2 Sherman Act claims. Unfortunately, the court of appeals did not articulate a meaningful standard against which this conduct could be evaluated, much less a standard consistent with this Court's precedents. *See, e.g., F.T.C. v. Indiana Fed'n of Dentists,* 476 U.S. 447 (1986) (agreement by dentists to withhold x-rays could constitute Section 1 violation).

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[14](...continued)
Ann. § 19-702 (1990); N.Y. Pub. Health Law, §§ 4400 *et seq.* (McKinney 1985; Supp. 1996). *See* Jon B. Christianson, *The HMO Industry: Evolution in Population Demographics and Market Structures*, 48 Med. Care Rev. 3, 29 (1991) (forty-six states have HMO statutes).

As was the case with the market definition issue, the court of appeals ignored much of the evidence supporting the jury's findings of conspiracy and anticompetitive effect. But even if one simply considers the evidence conceded by the court of appeals, it is clear that the court of appeals substituted its "skepticism," boldly wrapped in its rhetoric of "contemporary antitrust principles," *Blue Cross* (Pet. App. at 3a), for application of this Court's precedents. In addition to conceding the fact, and affirming the jury's finding that respondent Marshfield Clinic had entered into *per se* illegal market allocation agreements with other physician groups in north central Wisconsin (*id.* at 18a), the court of appeals conceded that there was evidence in the record:

> --that Marshfield physicians prevented competing physicians from obtaining privileges at the key hospital in the area;
>
> --that Marshfield physicians wilfully refused to provide cross-coverage for physicians unwilling to adhere to Marshfield's HMO scheme;
>
> --that there was substantial proof of price-fixing allowing Marshfield to achieve "most favored nations" ("MFN") status vis-a-vis hundreds of otherwise independent physicians; and
>
> --that Marshfield physicians acted in concert with other physicians and hospitals with the express purpose of foreclosing entry by competing HMO insurers.

However, the court of appeals does not discuss the extensive factual findings in the trial court record concerning these anticompetitive practices (Pet. App. at 32a-37a).

Notwithstanding this litany of anticompetitive and conspiratorial acts, the court of appeals is curtly dismissive and fails to even cite relevant authority of this Court. The treatment of most favored nation ("MFN") clauses is but one example of this. Although in *Connell Construction Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 623-24 (1975) this Court recognized the anticompetitive effects of MFN clauses, the court of appeals expresses the view that MFN clauses are virtually always procompetitive (Pet. App. at 16a-17a).

Indeed, the court of appeals failed to put MFN issue in context by ignoring the obvious connection between the generous pricing arrangements respondent Marshfield afforded its affiliated doctors, on the one hand, and the affiliation agreements with those same doctors, on the other. In essence, respondent gave its affiliates a share of its monopoly profits but retained control over the affiliates' ability to discount to competing HMOs (Pet. App. at 31a-33a). Whether one characterizes these arrangements as classical MFNs, *de facto* MFNs, or something else, the jury was appropriately permitted to consider this evidence. Indeed, the court of appeals' admission that respondent Marshfield's actions toward independent doctors are "ambiguous from the standpoint of competition and efficiency" (Pet. App. at 13a), underscores the lack of any basis for overturning the jury's verdict.

If these anticompetitive acts are held insufficient to support a jury decision, as the court of appeals held, it will be extremely difficult for state and federal antitrust enforcers to maintain competition in health care markets.

CONCLUSION

For the foregoing reasons, this Court should grant the petition of the petitioner for a Writ of Certiorari.

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